Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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RYAN MELVILLE, on behalf of himself and all others similarly situated,

Plaintiffs,

-against-

21 CV 10406(KMK)(VR)
Conference

HOP ENERGY LLC,

Defendant.

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United States Courthouse
White Plains, New York
October 31, 2023

B e f o r e: THE HONORABLE VICTORIA REZNIK,
United States Magistrate Judge

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** Transcribed from recorded proceedings **

THE COURT: Good morning. This is the Melville case.

Will counsel please introduce themselves, starting with the plaintiff.

MR. SHUB: Good morning, your Honor. Jonathan Shub, Shub & Johns, for plaintiffs.

MR. McINTURFF: Good morning, your Honor. This is Burkett McInturff from Wittels McInturff Palikovic for the plaintiffs and the proposed class.

MR. McLAUGHLIN: Good morning, your Honor. This is Matt McLaughlin and I'm with Kevin Saunders from Nixon Peabody LLP for the defendant.

MR. SAUNDERS: Good morning, your Honor.

THE COURT: Good morning everyone.

So we are here to discuss the various disputes that the parties have brought to my attention and I'm hoping that we can work through them methodically to see if we can reach a resolution and you all can move forward with the case.

So I guess I'll start with Mr. McInturff and Mr. Shub. Can you describe for me what exactly you think you really need from the defendants and what you think they haven't provided.

MR. McINTURFF: Thank you, your Honor. This is Burkett McInturff. I'll give the first crack.

So starting with ECF 75, the main issue is picking up on the order that your Honor issued at the July 18 conference

over three months ago regarding defendant's identification of the contracts that applied to its customers over the various geographies and the various time period. We expected when we started -- if your Honor will recall, this issue came up on a motion to compel because the prior defense counsel was objecting to the class definition as being overly vague, and it came out in that conference on July 18 that, in fact, what defense counsel, then defense counsel's true concern was that they were not able to locate the contracts that applied to Hop's customers across the various geography and over time. And so your Honor ordered the parties to begin a conferral process to try to figure out how to identify the applicable contracts.

Shortly after, about ten days after your Honor's order, Hop relieved its prior counsel, and shortly thereafter current counsel at Nixon Peabody appeared. It's now been over three months and we've been working to try to identify the contracts.

At this point, there hasn't been, from plaintiffs' perspective, there hasn't been material progress and the path we're headed down, from what defendant is proposing, is not going to actually get us a sufficient answer. The path -- to best understand our proposal is to understand what the methodological flaw in the defendant's proposal is, which is the defendant had uploaded some 200,000 separate contracts. If

I could provide a little more background. The defendant claims to have the contract that applies to each customer saved in a database, but they don't have any sort of record as to which contracts were applied over time.

In fact, my understanding from discovery is that they don't even have -- they don't even have a record of which contracts actually exist. So they can't, for example, say -- they can't produce to us, for example, say the contract that applied to this region of New York in 2019. They can't point to it. They don't have it.

So instead, defense counsel is saying of these 200,000 or so contracts that they've got in their database -- and I should say, our understanding is is that each customer in the defendant's database, each customer has a contract associated with their account. So we're talking about 200,000 accounts. They've uploaded all of these contracts to their eDiscovery provider and they're now starting to run search terms to try to identify any differences across them.

The reason that is methodologically inadequate for our purposes is we're not going to get admissible testimony from that process that is going to tell us for any given customer at any given time period here's what the relevant pricing term is in the contract. And if your Honor will recall, the reason the pricing term is so critical is that's what this case is about. The defendant promised to price its

heating oil in a certain way and the plaintiffs allege that they breached that pricing promise.

Now, there's a dispute about what that pricing term means and the defendants have taken the position that the pricing term actually gave them quite a bit of discretion in how they would calculate and charge them rates. So plaintiffs also pled, in addition to our breach of contract claim, pled an alternative claim for a breach of the duty of good faith and fair dealing which Judge Karas also sustained, so he sustained the breach of contract claim saying he construed the contract as basing Hop's heating oil prices on Hop's wholesale cost of heating oil. And then he said, in the alternative, if Hop is right, plaintiff has still pled a claim for breach of the duty of good faith and fair dealing insofar as Hop may not have set their prices in -- Hop may not have used its discretion in good faith.

So one way or the other, we need to know the pricing term for every proposed class member. And defendant's proposed analysis of these 200,000 or so contracts really is, in our view, is going to prepare the defendant to do one of two things that will be admissible and useful in this case. Either the parties can stipulate to what the pricing term is across the various geographies or the defendant can prepare a 30(b)(6) witness, and we can take testimony on the pricing term. Because, fundamentally, this is a recordkeeping issue with

defendants and the way the defendants ran their business. You know, it's black letter law that consumers and employees and other third parties don't have to suffer from the recordkeeping inadequacies of defendant and that we're entitled to an efficient production of information.

So we think that the best way to move forward, given that it's now been three months, is that either that defense counsel wrap up its analysis and either they prepare a witness for a 30(b)(6) deposition so that we can take testimony, binding testimony, as to which pricing terms applied to which customers over which geographies or the parties can get to work on a stipulation based on the information that defense counsel has, and then we can button this issue up and move on.

Because, you know, we've done cases like this in many different jurisdictions against many different energy companies, and I can tell you, we've never had an energy company that couldn't tell us what the operable contract was across the geography, and we spent many months working on this, and we need to bring it to a head and put it behind us.

So that's the thrust of the first letter motion or of the joint letter that's at ECF 75.

THE COURT: Let me ask you a followup question about that.

MR. McINTURFF: Sure.

THE COURT: So why -- looking at the sample contracts

that were provided to me, they do provide the pricing term, from what I can tell. So what is it that you wouldn't be getting from defendants? If they were to produce to you the contracts based on search terms that they have within this database, what is it that you wouldn't be getting if you got those contracts?

MR. McINTURFF: What we wouldn't be getting is the ability to identify across the proposed class which contract applies. So that's why we either need -- we either -- at this juncture, we either need a 30(b)(6) or a stipulation. Because, again, what we're accustomed to seeing is the defendant can say, okay, here's the contract for Connecticut. We amended it twice. We amended it in 2019, then we amended it in 2022. Here's the contract and here are the amendments.

Here's the contract for New York. It was never amended.

So then we know which customers were subject to which pricing term. Because when we go to the class action trial, what we're going to argue is, you know, this group of customers was subject to this pricing term and we're going to put questions to the jury like, if the contract promises the promotional prevailing retail price for first-year customers, for example, then it's going to be a question of fact as to what that price would be. But we can't -- until we get our arms around the scope of who's covered by these contracts --

and again, there's no question that that defendant -- the defendant has the various contracts, they just don't have a way -- their recordkeeping issue is that they don't have any way to identify which contracts apply to which customers in an aggregate setting.

So what we're missing is that aggregated discoverable and admissible information that, at this point, we only think we can get through a 30(b)(6) or a stipulation.

THE COURT: Okay. So but if you got, which I understand, but if you were to get all of the information that we're talking about, does it derive from -- would you be able to get that information if you had the underlying contracts themselves? Meaning, let's say they gave you all 200,000 contracts. I'm not saying that's what you should get, but let's say you got all the contracts. Then presumably you would be able to sort -- it would be a big task perhaps -- but you'd be able to sort them by geographical region, by time period, and then I guess you'd have to do -- you'd see chronologically how they'd change. So it would be this manual process of figuring out which contracts applied to which customers at a particular point in time, and you're saying that the work of doing that is not something that you should have to do but that defendant should have to do.

Is that fair?

MR. McINTURFF: Yes, I think that's fair. I think to

put an additional point on it is that defendants can't operate their business without understanding what contracts apply to which customers. They're serving customers ostensibly under various contracts.

So the fact that they can't produce this is not -- it's not fair for us to have to sift through this and do what can be done in either testimony or a stipulation.

THE COURT: But am I correct, though, that the information that you're seeking could be derived from analysis of all the contracts that they have?

MR. McINTURFF: Assuming there's adequate metadata, which I'm not so sure there is because we asked, we suggested that metadata be used to identify the contracts. But assuming there's adequate metadata associated with each customer account, it is theoretically possible to perform that analysis, that's correct.

THE COURT: And when you're requesting a 30(b)(6), what you're looking for is testimony that would say what their policy or practice is as to pricing the contract that's applicable, and which pricing term applied and in this geographic region during this period of time.

MR. McINTURFF: Correct.

THE COURT: You're hoping a witness would be able to be prepared to say what their policy and practice was with respect to that.

So have you asked defendants for documents, I am assuming you have, about what their policies or practices were for the contracts that they've used and the pricing terms for particular geographic regions and have you received that.

MR. McINTURFF: Correct. I mean, that was the genesis of our, that's been the genesis of our repeated requests after the July 18 conference.

Again, July 18 we found out from prior defense counsel that they were having trouble identifying which contracts applied and then your Honor ordered us to look further into it.

THE COURT: Were there any contracts that were produced?

MR. McINTURFF: Yes, there were.

Again, there's been a smattering of contracts produced. It's not the issue of being -- the issue is not being able -- we can all determine the relevant pricing term from a produced contract. The issue is which contracts applied to which customers over which time period.

THE COURT: When you say which customers, you mean in the aggregate like certain geographic regions. Because obviously the contract itself tells you the name of the specific customer and where they're located.

MR. McINTURFF: That's correct.

THE COURT: Okay. So let me ask -- I wanted to sort

of take this in bites to see if we could move through the issues. So that's sort of the first issue.

Mr. McLaughlin, can you explain to me your position? I understand you have all of these contracts. Is it correct that there isn't a policy or practice within Hop Energy that allows you to be able to identify the type of contracts that applied to particular regions during particular periods of time?

MR. McLAUGHLIN: That's correct, your Honor.

The company did not preserve, as a practice, the form contract in any given period of time. They keep -- and they do that because they don't want their various branches which operate under different names to have access to old form contracts and use the wrong contract. So they keep their current form contract for the different types of plans that are available. Those have been produced.

They keep every historical actual contract with the customers. We have all of those. But there's not a meaningful way for us to say in any particular region, in any particular year, what -- what did the contract look like in 2017 in every region. The general policy was that when the contract was -- when there was a change to the contract, it was applied company-wide and it was adopted in every branch. But the challenge, and what we have -- we have produced samples of contracts to the plaintiffs. We can't be sure that there was

not other changes. And from the samples that we presented to your Honor, there are some, I would say, nonsubstantive changes to various contracts.

But the terms that are at issue in this case are the same, but there are formatting differences. There are font differences. There are some other, I'd say, nonmaterial provisions that appear in one and not in the other. But there's not a way for us to meaningfully say with any confidence what a particular contract in a particular geography looked like at a particular point in time without just pulling some contracts in that range and looking at them. And that's what we've proposed to do here.

We can run search terms. For example, in the other class action that we're defending in Pennsylvania, that actually applies to all types of contracts that we provide. We've done that exact exercise. We have pulled for every year for every branch the sample form contracts. So you can see over time what changes were made.

But there's not a way for us to say for certain whether any change was made to any specific branch contract at any period of time. I don't think a 30(b)(6) deposition is going to give us an answer because there's nobody at the company -- if we had that answer, we'd be able to tell them. It would require us to go through that same exercise of pulling and analyzing all 200,000 contracts and seeing if there's any

differences.

And I don't think that's proportional for the claims in this case. The claims in this case, the proposed class are the customers who have agreements that are tied to first year customers' promotional rates. The only -- from our internal searches of the 200,000 contracts, the only customers that have, that we have discovered that have that language, are Connecticut based customers and only for a period of four or five years, 2016 to 2020 or so. We haven't found a single contract outside of Connecticut that uses -- that used that unique language that was alleged in the complaint.

And so we don't think it's necessary. We are happy to provide -- and I think what was contemplated the last hearing, I wasn't there when I read the transcript, what your Honor said was run search terms. We can run search terms to try to identify differences in contracts. We've offered to do that. We've invited search terms, but from the exemplars that you've seen, there's not going to be meaningful differences across the years for the terms that are at issue in these contracts. And so we think that a sampling is the most appropriate way to get the plaintiffs what they're looking for here.

This notion that we have -- we just don't have a formulaic way of -- and I don't think we have any obligation. The fact that the plaintiffs view that as odd that the company

didn't preserve their form contracts over a historical period of time, that was just not their business practice, but they have the actual contracts.

THE COURT: So Mr. McInturff, if defendants were to produce -- why are the search terms inadequate? Why is it -- going back to what we initially talked about, running search terms to identify the relevant contracts during the relevant time period -- why would that not get you what you want?

MR. McINTURFF: Yes, your Honor.

The reason why just running search terms is inadequate is because that's not going to tell us what contracts apply during which time. We would get -- essentially we would get some sort of sample of the contracts.

We're amenable to a reliable sampling methodology where a random selection of contracts is pulled, then followed by a stipulation as to the pricing term. I mean, defense counsel has just said there's no meaningful differences in the pricing term. That's what we believe too, but the idea that we're going to -- we can't -- we can't achieve finality on the issue of what contract applied to which customers, short of a stipulation, or short of binding testimony from the company, because we certainly -- it's not possible to analyze 200,000 different contracts. And again, it's not our -- that burden, it's not fair for us to bear that burden.

So what we would propose is, you know, since we all

agree there's no meaningful differences in the relevant pricing term language, let's stipulate to the relevant pricing term and move on.

THE COURT: Well, I think, before you do that, I mean, it seems like first priority is to actually get the documents. Right? I mean, all of this stems from the underlying documents which defendants have.

So it sounds like the first step would be some agreement between you about using search terms to locate a sample of the relevant documents over different periods of time so that you have a universe of documents to work with. And then based on an analysis of those documents, it sounds like you would be able to then follow up with a deposition to get binding testimony based on the contracts that you see or perhaps a stipulation if the parties see that there's no meaningful difference in the language of the contracts that are pulled. But absent getting the underlying documents in some form, it's hard for me to imagine you'll be able to reach -- to get a stipulation from defendants that would be agreeable.

So is there some reason why the parties can't agree upon a sampling exercise that allows you to look at a sample of contracts year by year, region by region, so that you have something that you can look at, so you can analyze this question?

MR. McINTURFF: No, your Honor. We can, we can agree

to an appropriate sampling methodology. We wouldn't need search terms to do that. Because, again, imagine this database, each customer, Jane Q Public and John Q Public, each have a contract associated with their account. They have a unique account number. We can take a random -- a statistically -- oh, now I'm stumbling over my words -- a statistically significant random sample that is representative of the contents of the database, and there's sampling methodologies out there.

We've done this in many cases where we can take this -- we can take a sample of the contracts without using search terms. They would just pull down the ones associated with the various accounts and we would be sure to do it, to pick a number of sampled accounts that would account for the different geographies and time period, and then we can look at those, and I agree, your Honor, I think either we could stipulate or then go forward with the 30(b)(6) deposition.

We would be willing to agree to that and we appreciate your Honor's guidance on that point.

THE COURT: Well, so Mr. McLaughlin, is this in line with what you were imagining? You were imagining some sort of sampling and production of relevant contracts, if I'm understanding correctly.

MR. McLAUGHLIN: Yes, I guess I don't know what -- what specifically significant random sampling entails, but I

don't think -- I don't want to oversimplify it, but I don't think this is that -- I mean, I agree with plaintiff -- I don't think at the end of the day we are going to find meaningful differences in the contracts over the class period. And if we're limiting it to the first year, the contracts that have this first year language where -- I don't think we're going to see any changes at all in the Connecticut customers that have that contract.

So I think -- I'm happy to work with plaintiffs on a way to give them that sample, but I don't think -- I don't think it's going to require more than picking a couple of months in each year and every branch -- I mean, this is exactly what we did with plaintiffs' counsel in the *Callery* case under the direction of the discovery master in that case, which was pick a couple of months, pick every branch, and produce a sample contract.

We've offered to produce all of those agreements to the plaintiffs here. It was, I think, approximately 200 contracts that would show the contract, what it looked like in each branch over the course of the years. And, to me, that will give plaintiffs what they need. It should give them more than they need because that is 95 percent contracts that have nothing to do with the actual class in this case, which is the first year customer contracts that only existed in Connecticut.

MR. McINTURFF: If I can just respond.

THE COURT: Yeah, you can, but let me just ask a followup for Mr. McLaughlin.

Your suggestion is you use search terms that would limit the sampling to those contracts that included that prevailing retail price language as opposed to I think what Mr. McInturff is suggesting, which is searching without limitation of search terms across regions; is that correct?

Mr. McLaughlin, is that what you're -- you're proposing sort of a more narrowed, random sampling. It sounds like Mr. McInturff, which I'll speak to in a second, is proposing something slightly different.

MR. McLAUGHLIN: Except that the sampling that we did in Pennsylvania was not limited, because that case is more -- that class is broader. That is not limited to the first year customers that is at issue in this case. So the sampling that we've already done extends beyond the first year sampling. So those hundreds of contract samples that we've offered to provide capture more than the contracts that are at issue here.

THE COURT: Understood. Okay, so I get it.

So Mr. McInturff, first, why have you not agreed to get at least those 200 contracts defendants have offered and then you can make whatever point you wanted to make?

MR. McINTURFF: Sure, sure.

So the reason is that you can't -- we have to assume we're going to have a dispute. We can't assume that we're

simply going to then be able to stipulate on the relevant pricing term. But it's not an adequate sample to just pick a couple of months.

I know a lot of lawyers do that where they'll say, oh, we'll just take a couple of samples in a wage-and-hour case. We'll give you the hours of people every couple of months. But when push comes to shove, that's actually not an adequate sample. We have to design a sampling methodology. It is going to have a reasonable margin of error. It can stand up to reasonable critique. Because in the event that we don't agree, we will put forward a position with respect to which contracts apply to which customers. And without the basis of an adequate, appropriately represented sampling methodology, well, we can't do that.

So that's why we can't agree to just take sort of the every couple of months from defendant. But, you know, we've done this many times and ultimately the number of contracts that have to be produced is really a function of the different variations, the different facts we're looking at.

So we may -- it may be a little larger than normal because of the fact that we're looking at various states, but typically the amount of contracts or the amount of any sample you take is a small fraction of the overall number. So if we're looking at 200,000 here, I can't tell you the exact number, we do the variables, but my colleagues and I are doing

sampling in another case, and we have like a million and a half, the pool was a million and a half, and I think ultimately at a 95 percent confidence we sampled like 400 out of the million and a half.

So it's not undigestible, but we just can't take the methodology that was employed in the other case because it won't stand up if we don't agree.

THE COURT: All right, and I was suggesting, I guess I was suggesting why -- I understand why you might want something in addition to the 200 contracts, but why not accept as the low-hanging fruit at least those 200 contracts which they've already collected and you know what the methodology is.

Is there some reason, Mr. McLaughlin, that you wouldn't be amenable to producing those 200 contracts that you have already collected from the other case and also agreeing to some additional sampling that would be slightly broader?

MR. McLAUGHLIN: No issue on the first piece of providing those. I guess my concern is what I just heard, which is it's like we're trying to find an issue that I don't think is going to exist. When they look at the samples that we produced and they see, I actually don't think we're going to have an issue about what the contract said because there's not going to be a meaningful difference over the years in what the -- the terms have really stayed the same as far as what's at issue in this case.

THE COURT: Okay. So based on that, Mr. McLaughlin, are you suggesting that because there won't be a dispute, you likely would be willing to stipulate to that issue once you've produced the contracts and plaintiffs review them?

MR. McLAUGHLIN: Yeah, I think perhaps. I don't know what stipulation they're looking for. But I think if they review these samples and there's nothing different from -- for what they're looking to litigate. The contracts say what they say. I don't see a reason why we wouldn't be able to stipulate to the contract language that we all can look at and see existed over the period of the course of the case.

THE COURT: So the 200 contracts that you have in hand, do they cover the geographic areas that plaintiffs are concerned about in that proposed time period?

MR. McLAUGHLIN: Yes.

THE COURT: Okay.

So Mr. McInturff, what about if you -- to get to a quicker result here, what if you got the 200 contracts that they already have in hand, you reviewed them and then propose a stipulation based on your review that essentially gets you what you need in terms of having defendants agree that these are the pricing terms that applied to these customers in these geographic reasons over this period of time.

That would get you -- if defendant is right that you will have reviewed them and you'll be able to craft a

stipulation so this won't be a disputed issue, would that serve your purposes or would there are something missing from that?

MR. McINTURFF: If we can ultimately agree on a stipulation, it would serve our purposes. The issue that I'm concerned about is if we can't agree, the cost to us to review and analyze 200 contracts is going to be wasted when an adequate sampling -- the cost to do an adequate sampling is going to be as easy as working on a sampling methodology, which we've done many times, and I'm confident that defense counsel has seen similar sampling methodologies. And then going and doing the sampling methodology, which, again, I don't think is going to end up pulling materially more contracts than the 200 they've got and then that way we do it just once.

But if your Honor's suggestion and defense counsel is so confident that we're going to be able to stipulate on the basis of what has already been pulled, we'll go with that, but we want to reserve our rights and make clear that if we aren't able to agree and then we have a dispute about which language applies, then we would have to do sampling. So our position is let's go ahead and do the sampling because it's not that much more burdensome than what's on the table and that way we can just do it once. But if your Honor and defense counsel think that it's -- that that's unnecessary, we'll go forward with the 200, but we may have to go back if we can't agree.

THE COURT: And how large of a sample are we -- I

guess, Mr. McLaughlin, in terms of, if we were to do a slightly broader sample, but that would amount to, I don't know, slightly more than 200, it sounds like it wouldn't be substantially more at all, how long would it take for you to accomplish that sampling and production do you think?

MR. McLAUGHLIN: Your Honor, today is the first time I've heard any request to do any sampling.

THE COURT: Okay.

MR. McLAUGHLIN: So I don't know what it entails. It sounds like they're not saying they don't want to use search terms. I don't know what the parameters of that sampling are. If it's something that our vendor can, based on what the request is, can run that through the database of contracts fairly easily, I don't object to that. I don't know what it is that they are asking us to do to come up with a sampling. We had no discussions about that previously.

THE COURT: Okay, understood.

MR. McLAUGHLIN: Maybe it is easier. I don't know.

THE COURT: Okay. Well, let's see, I think that it sounds like the first step would be for plaintiff to come up with a proposal and for the parties to meet and confer about what a sampling of the 200 -- is it 200,000 contracts in the database, Mr. McLaughlin?

MR. McLAUGHLIN: Yes.

THE COURT: Okay. So what their sampling proposal

would be so that you can meet and confer. Ideally, the parties would agree upon some sort of methodology and a protocol for the sampling.

You'd be able to, Mr. McLaughlin, take that, have your vendor do it and produced fairly quickly, and then based on that production, plaintiffs would be able to determine for themselves whether the parties could stipulate to these various issues relating to which pricing terms applied to which customers, or whether they need to seek depositions, either by 30(b)(6) or some other method, to get the binding testimony they need about the issues at play here.

So how long do you think, I'm mindful of the fact that you have these discovery deadlines and you need to move things along, and I recognize that these issues have taken some time to work themselves out.

So how quickly, Mr. McInturff, would you be able to come up with a proposal and then meet and confer with Mr. McLaughlin?

MR. McINTURFF: I think I could come up with -- I could transmit a proposal to Mr. McLaughlin by the end of this week in terms of the methodology.

THE COURT: Okay. I know it will take some time for you to work through that, so how about the parties meet and confer about this contract issue, see if they can come to an agreement about a sampling methodology for the contracts in the

database and then report back to the Court by Friday, November 10 as to the status of the negotiations and whether you're moving towards a resolution of getting those contracts produced.

MR. McINTURFF: That works for plaintiffs.

MR. McLAUGHLIN: That's fine.

THE COURT: Okay. So what is the next issue that you wanted to address, Mr. McInturff?

MR. McINTURFF: So the next issue we turn to ECF 77 in our discovery letter motion. So if your Honor wants to take it in bites, the first would be our request for the information requested in interrogatories number one and two in our third set of interrogatories, and that's under the heading in the letter. Starting on page 2, it's item B-1 that says Hop must provide basic information about its rate-setting practices.

The background here is interrogatory number one asks Hop to identify the category, the data, and documents that it relies on and references when setting heating oil rates. And then the interrogatory number two asks for Hop to provide a description of its wholesale purchasing practices.

Both of those -- both of that requested discovery is relevant because, first of all, again, as I mentioned before, Judge Karas found that the contract at issue that applied to plaintiff Melville requires that Hop's prices fluctuate as its price to procure heating oil changes. So identifying the

categories of documents and data that Hop relies on when setting its heating oil prices, that's interrogatory number one, is germane to that question because whether or not that sort of process follows the contract is going to be relevant to our claims. And we cite the summary judgment opinion issued on August 14, 2023, in the Eastern District of New York in a case *Mirkin v XOOM Energy*, where the Court relied on documents that were considered at rate-setting meetings in determining that the defendant had not established that it had followed its contractual pricing term.

Similarly, our good faith and fair dealing argument is that Hop, to the extent Hop had discretion set rates, the process could show whether Hop exercised its discretion in good faith.

So, again, interrogatory number one says identify the categories of documents and data Hop relies on when setting rates. We think that's relevant.

And then interrogatory number two to describe Hop's wholesale purchasing prices. Again, if the contract price is tied to Hop's cost of oil, we want to see how Hop is purchasing its oil, what the practices are. Is it buying on the spot market? Is it buying a day ahead? Is it hedging? So that's going to help us determine whether or not prices, Hop's prices, were tied to the pricing term in the contract.

And then, again, to the extent that Hop has more

discretion, and we believe for the duty of good faith and fair dealing description of Hop's wholesale purchasing practices will shed light on whether Hop set its rates in good faith.

So both of these requested items are relevant. Hop's responses were boilerplate. They did not -- it did not establish any overbreadth or burden, and so we don't think that they've met their burden to resist this discovery.

In addition, Hop's last argument is that we have exceeded 25 interrogatories. We have not. This is a counting dispute. The defendant went back, defense counsel went back and counted our last interrogatories that were issued to the prior counsel and has come up with a new counting mechanism that is saying that they don't have to produce this discovery because we've exceeded 25, and we don't believe we have, because the case law is clear that if it's logically or factually subsumed, it's a single interrogatory.

And more importantly, this is a complex litigation. We just got finished with a conversation about 200,000 separate contracts. To the extent that the Court doesn't want to engage in the counting analysis, we think it's more than reasonable that these interrogatories are very (indiscernible) in efficient ways to elicit the requested discovery.

So to the extent that even if defendant were right, we think that they should still be required to respond to this information because this is critical additional discovery.

THE COURT: Okay.

So Mr. McLaughlin, at least with respect to interrogatory number one, what is your argument as to why you shouldn't respond putting aside the counting issue?

MR. McLAUGHLIN: So aside from the counting issue, I think that this is information that plaintiffs have sought and through their document requests we have agreed on the -- we have proposed the data sources that we would run searches for that would include this information and we are -- we've now received their search request. We're going to respond.

I think that the -- I think that sequentially this should proceed with documents after the document discovery is complete, then they can take depositions. I don't think an interrogatory is the most practical way of getting this information.

I think that it is much more appropriate to proceed with the document search and they can review the documents that we produced that will educate them about this process, and then they can take depositions of witnesses about this process. I just don't think interrogatories is the most appropriate discovery device.

I think it would be -- I think it would be the most burdensome for the defendant. I think it should -- and I don't think -- I think Rule 33.3 contemplates that, that interrogatories of this nature follow only if document

discovery in depositions are not the most practical. And we haven't even produced the subset -- we haven't even agreed yet on the search terms to get these materials. I think it should just take place in the, I would say the more traditional sequencing.

THE COURT: So Mr. McInturff, so am I correct, then, that was my next question, you've asked for, if we just look at interrogatory number one, which asks to identify the categories of data and documents relied upon or references setting its variable rates, et cetera, have you requested those same documents in your document requests?

MR. McINTURFF: We have requested documents in our document requests that we believe will encompass this information.

But going back to local Rule 33.3, it contemplates requests for the existence, location, and general description of relevant documents. That's what we're asking.

We're saying help us understand what categories of documents Hop is relying on or referencing when they're setting heating oil rates so that we can then follow up with more targeted requests. If they're telling us -- my understanding, based on conversations with counsel is there really aren't any documents that they're relying on, and so we ask this, in part, to button that issue up. But if there are documents that are being relied on to set rates, we want them to be identified.

If they can't identify them, that's certainly germane to our claim that they can't identify whether or not they're -- what documents they're relying on to set rates. And again, it's well within the, within the scope of 33.3.

So what we would expect, what we expected is, is the defendant would just answer the question because there's no reason for -- this is essentially a policy question and there's no reason for us to have to piece together from document discovery what the defendant's practices are. And again, we're just saying identify the documents you rely on in setting rates.

THE COURT: So Mr. McLaughlin, you referred to document production. So the way you would proceed is you view these as documents that have been requested. So you will then go about doing searches to identify these responsive documents; is that right?

MR. McINTURFF: That's right.

THE COURT: Okay. And you would do that however you do it through search terms, however you decide is the best way to respond. So in doing that, don't you necessarily have to identify where you're looking for those documents? I'm wondering why you believe it's burdensome to just indicate where the documents -- what types of categories of documents you're relying upon in producing the documents to plaintiff. I haven't made a decision about how I'm going to rule on this,

I'm just asking the question.

What is so burdensome about that piece?

MR. McLAUGHLIN: So the burdensome objection was with respect to the way that interrogatory one is drafted. Again, this case is limited to, and plaintiffs' prior submissions to the Court made clear that their case is a much more narrow case than the *Callery* case, when there was a request by prior counsel to stay this litigation pending the outcome of that prior-filed case, that this was a subset. That this is only dealing with first-year customers, not all of the other contract types that are out there. And this request is not so limited.

And so that's -- this is identify the category of data and documents that defendant relies on basically with all of its rate setting or pricing without limitation. So that was -- that was the basis for the overburdensome objection.

To your point, it's not -- I don't think the burden would be high to identify, for example, the various pieces of information that, in general, over the years, the company has considered when setting its first year promotional retail price, which is the issue in this case. We've relayed that information to plaintiffs' counsel how, in general, the company sets that price and has over the years.

So my view was we've relayed that. We've given them the date. We've given them the proposed data sources that

includes the folders and the mailboxes of the person that's responsible for -- largely responsible for setting these prices and has been during the entire class period, that they can run the searches and they will receive the documents.

THE COURT: Okay.

Mr. McInturff, why is that not sufficient? Because, in my view, Rule 33 does allow for parties to respond to interrogatories such as this by saying, see the documents, if that's a most efficient way to do it.

MR. McINTURFF: Well, first of all, it's definitely not the most efficient way. What defense counsel just said is is we've identified a custodian and you can search his email to tell us whether or not there's anything in the custodian's email inbox that answers this question. I mean, that is definitely not the most efficient. That's the least efficient way to do it.

Again, we're asking for them to identify the categories of data and documents they rely on in setting rates. And counsel alluded -- he said that he's already sort of disclosed it. What he disclosed to us is that they didn't -- they sort of, you know, stuck their thumb up in the air and felt where the wind was blowing. So we want an admissible answer as to that question.

And I will say also, defense counsel is changing his objection. He said he objected on the basis that he thinks the

class is more narrow than it is.

First of all, we're entitled to class-wide discovery in order to define the class.

Second, that's not what the objection says. This is straight boilerplate and we shouldn't be required to file a motion to hear defense counsel's true concern here.

We're entitled to rely on the objection that's written in this interrogatory response and it is complete boilerplate. So I don't think defense counsel should be permitted to amend their response.

THE COURT: And then finally, your Honor, the point that your Honor made about being able to produce documents in response to an interrogatory, they would need to identify by Bates stamps the documents that are responsive to this. They haven't done that.

Again, this is -- this is a simple question. I think the reality is, is defendant doesn't have a good answer, but we're still -- we're still entitled to the answer to the question because it's well within the -- what's contemplated by Rule 33.

MR. McLAUGHLIN: Your Honor, can I just respond briefly to that?

THE COURT: Yes.

MR. McLAUGHLIN: I certainly did not convey and it is not the case that my client puts its thumb in the air to come

up with pricing. That is simply false.

I did not -- it is not required by the rule to identify by Bates number if you're going to produce documents in response to -- in lieu of answering an interrogatory. The rule provides that if documents are a more appropriate and sufficient way to provide the information that the party can produce those documents, there's not a requirement that they are identified by Bates number in the interrogatory.

And these are not -- I disagree that they're form objections. We included these specific objections. When we had a meet and confer on these requests, the only issue that plaintiffs raise was our objection that this exceeded the number of 25, which we stand by, and we think that if you look at the prior interrogatories, that that was also a valid objection.

So I don't think that we're changing our position. That's always been our position. I think our objections have always been valid.

THE COURT: Okay. And is there some reason why, Mr. McInturff, you're asking for categories of data and documents that go beyond the promotional rates that are at issue in the case, concerning Mr. McLaughlin's point that you're asking for a whole host of other type of rate-setting information?

MR. McINTURFF: Sure, sure. There's two points.

One is, that, again, the class is not necessarily limited to customers that had identical contract language. In fact, in the *XOOM* case that we cited, the Eastern District of New York, the Court there recently certified a class that included customers with substantially similar language to the language that the plaintiffs had.

But more importantly, how the defendant sets its other rates also sheds light on how they either could have or arguably under the contract should have set its rates applicable to class members.

So one of the things that's very common in these cases is that the defendant will have a rate-setting process for capped or pre-buy rates, which is essentially where the customer locks in, locks in the rate ahead of time. The way that a defendant energy company will set the rates on a locked-in price will have far less more than anything profit margin built in because the defendant knows that the price is what it is and the customer knows the price. But with the variable rates, the customer doesn't know the price ahead of time, and so what they'll do is they'll charge a much, much higher margin. So when you look at the categories of data and documents that are considered in those various rate-setting capacities, you can see very wide differences in the way variable-rate customers like proposed class members in this case are, how the pricing methodology was made as compared to,

say, capped or pre-buy customers. So that's why we're asking for the additional information.

But, again, I want to emphasize, the underlying business here is they're buying home heating oil at wholesale and they're reselling it. There's not going to be a lot of datapoints that they're going to be relying on, and so why they can't simply respond to the interrogatory under oath and provide the information, we believe, again, the real reason is is the answer is not going to be very good for defendant's merits defense, which is why we ask the question at this juncture, after we have spent many months trying to get to the bottom of discovery and what we're beginning to understand is, in fact, there was no sort of real reliable methodology that based rate setting on the terms of the contract as Judge Karas has construed it.

So we think the appropriate thing to do is order defendant to answer the interrogatory and then we can move on from there. If we need additional document discovery to get to the bottom of the issue, then we'll issue additional discovery. But this idea that we sift through document discovery on such a straightforward issue, we just disagree that that's the most efficient way.

THE COURT: Okay. So based on what I've heard, here's my view.

For interrogatory number one, which refers to the

various rate setting, I believe that the interrogatory should be limited to the promotional variable rates or similar rates relating to the contracts at issue, not the whole host of other rates that don't apply directly to the case. Number one.

Number two, defendants can respond to this interrogatory by producing responsive documents that would respond to that request, but in doing so, should identify the Bates range produced in response to this interrogatory.

To the extent that plaintiffs are seeking admissions relating to the point you made, Mr. McInturff, that you don't believe that there was a real way in which they were rate setting and the like, I don't think you're ever going to get that response or admission in a way that's clean and that won't be disputed in an interrogatory, and I think the most efficient way is for you, in the first instance, get whatever documents are responsive to this and then seek testimony that would get you the admission that you want. I think doing it by interrogatory is going to actually lead to more disputes. It won't shore circuit things. It will actually extend and delay things.

Moving to the second interrogatory, that's describing with particularity defendant's wholesale purchasing practices. I think we haven't yet argued about this yet, but just to cut to the chase, I mean, the way I read this interrogatory, it's not in keeping with Rule 33, the local Rule 33.3, because it's

going beyond just asking for basic information. It's actually more in line with the contention interrogatory that's asking for descriptions and particular purchasing practices and the like.

So I think at this stage of the litigation, it's premature to ask this type of interrogatory. It would be better suited to later in the litigation or in deposition.

MR. McINTURFF: Okay.

THE COURT: So the next issue is -- what's the next issue that's ripe for -- is that interrogatory number three?

MR. McINTURFF: Interrogatory number three, yes.

THE COURT: Okay. Go ahead, Mr. McInturff.

Looking at this, my initial view is that it is lengthy. It has a lot of subparts, some of which seem to be things that can be derived from the underlying contracts themselves, unless I'm mistaken. Others, I'm not sure where that information derives, but it looks like it's, for example, data analyzing external prevailing retail rates, data relating to rates for home retail oil charged by defendant's competitors, all the compilations of retail rates for home heating oil collected by third parties and the like.

To me, they are not subsumed under just one category of information. They seem like many, many subparts that aren't necessarily all related.

So I guess that was my first take when I looked at

this very long interrogatory with all of these various subparts. So perhaps you can explain to me what exactly are you looking for? What are you hoping to achieve by this interrogatory?

MR. McINTURFF: Sure. So we're hoping to achieve the identification of the data that we're going to use to build our damages model. We've issued this interrogatory in many other cases, and typically the response we get is the overwhelming majority of the information in this interrogatory is contained within the customer database, which is what we believe is the case.

You know, I should tell your Honor that we're negotiating a production of class member, proposed class member, potential class member data from the defendant's database. Much of this information is expected to be in the database and then there may be a few different discrete items of information that are outside of the database, and we're asking the defendant to identify for us. So I would expect customer name, customer account number, if the customer was acquired from another home heating oil company, identify that company. That's all database information. The customer's pricing term. You know, I think the answer to that is that that's not available.

The time in which the customer was charged the pricing rate described above. Similarly, we should be able to

get the time periods, service address.

Again, most of this is database related information. We just want the defendant to identify the location of this information, and then if there's other items that are likely not within a database like, for example, J or K data identifying retail rates for home heating oil charged by competitors, either they have that data in a specific location or they don't.

The same thing is analyze -- K, data identifying, describing, or analyzing any compilations of retail rates reflected by the US EIA. Either they have it or they don't.

If you looked down at L, that's delivery date. That's going to be database data. Price, M, is database data. N, is database data.

So I think your Honor can get the idea that we've -- these are critical datapoints that we're asking and that's why it's all one interrogatory for accounting purposes. These are datapoints that we're requesting that the defendant identify the location. I don't think it would take much more time than this call for the defendant to answer the interrogatory and then we can have much more streamlined discovery.

THE COURT: Okay. So Mr. McLaughlin, what's your response to that?

MR. McLAUGHLIN: So our position is that -- to your Honor's point, these are, in our view, 26 separate

interrogatories, but I think our general view is the same as it was previously.

This is information that -- I agree with plaintiffs' counsel that this is largely information that is, if it's available, it's in the database. We have already produced to plaintiffs every account. We've given them what our database has. Every field that it has. We've given them the actual data in that field for the named plaintiff with the expectation that we will then negotiate which specific fields they want us to provide for their proposed class.

But to the extent that it's not in the database, that is the place where I agree where this information, if it exists, should be produced from. Some of the other discrete, subpart interrogatory questions here I think, again, it is a request that is built into their search terms and then they will get the documents.

To the extent that they want documents related to K or J, then they've already offered search terms that will identify those documents and, again, I think that is the more appropriate approach here, is to produce the documents, including the database information and then, if necessary, depositions, not interrogatories.

THE COURT: So Mr. McInturff, why -- so you're getting the documents through this database where this information comes from. I mean, the purpose of this

interrogatory is to streamline and to figure out where information is. If you're already in the process of negotiating search terms and getting the actual documents, why do you need this interrogatory? What do you gain by having defendants go through this exercise with you if you're already doing it in a more informal way through meet and confers?

MR. McINTURFF: Well, there's two points. The first is for the items that we agree are in the database, the defendant -- we have been asking the defendant now for weeks to define the fields of the database that they produced. So they produced a whole list of fields with a lot of internal sort of nomenclature, and we've been asking them to tell us what the fields mean. And this interrogatory is meant to get at the identification of which fields in an admissible format, because, again, we're putting together a damages model.

So that's one.

And if there's an alternative to answering the interrogatory, the Court wants to order defendant to identify all of the database data fields that it has produced, that could get us through most of what's in the interrogatory. But then, in addition, there's items in here that are not in the database and consistent with Rule 33 point -- I think it's Rule 33.3, we're asking them to identify the categories and location of where this information exists, if it does.

So we're certainly not going to get that from the

database production.

THE COURT: Right, but it sounds like to the extent you're requesting these documents -- am I correct that separate and apart from this interrogatory asking for identification of categories of documents and data locations that you're separately negotiating a protocol to get those documents the produced to you.

MR. McINTURFF: Well, we have proposed search terms. We haven't -- the defendant has not responded to our search term proposal. We are still trying to work out an ESI protocol. But again, whether our discovery requests are going to ultimately yield the data that we're interested in is being sought by this interrogatory is not clear to us. I mean, we haven't had anything produced.

And again, what we're asking for is the defendant to simply identify where the categories of documents and data locations.

We don't have to take it in the order in which defendant is proposing where they just produce a bunch of documents and then we figure it out. We're entitled to know where relevant documents reside, and they should be required to tell us so that, to the extent that we have issues with the defendant claiming our requests were not sufficiently particularized, we can turn around and we can say, okay, here's a more specific request.

I mean, they're going to have to collect this information anyway, so they're going to know where they're going to collect it from, so they should be able to tell us where it's located.

THE COURT: Starting with the fields of the database, so that seems like the easiest one. It seems like some subset of these subparts in interrogatory number three are deriving from the database and the parties seem to agree to that.

So your issue, it seems, Mr. McInturff, is that you want defendants to define the fields of the database for you.

Do you have any problem with doing that, Mr. McLaughlin, providing a definition of the various fields of the database that you're agreeing to search?

MR. McLAUGHLIN: So the issue, your Honor, there are a lot of fields. There are a lot of fields that Hop doesn't even use. There is not a -- they do not have a glossary of terms for these fields.

We have repeatedly asked plaintiff to tell us what you want. Tell us what data you think you need for your case. We will then go back and figure out with our client which fields, if they provide that data. And then we can talk to you about those fields and we can give you definitions, explain what those fields mean.

Plaintiff has resisted doing that. They don't want -- they don't want to limit it. They want to say, they

have said, no, you tell us every field that exists and come up with a definition of what all those fields mean, then we'll pick from that list after we get -- after you do all of that work, then we'll decide which of those fields we think we would want.

That is just not a -- we are working with our client to come up with -- because this is all -- this is all -- there's not information that currently exists. Somebody would have to actually create product to provide these definitions and I think that is beyond the scope of the discovery.

We're not opposed to providing information. For example, we did this, again -- I don't want to keep relying on the other case, but we had this same issue in *Callery* where that is how it played out. Plaintiffs' counsel gave us -- handful of categories of data that they wanted. We agreed with the discovery master that we would come up with the definition for those specific fields that are at issue. I think that is more reasonable than what plaintiffs are asking here, which is come up with a definition for every field, whether we eventually want to look at it or not, and then we'll decide which of those we think we should ask you to search.

THE COURT: So looking at interrogatory number three and the various subparts, are you able to look at that list and identify with your client whether any of those categories are fields in the database?

Okay, so in the first instance, can you do that? Go back to your client, look at this list and say -- because this appears to be the list of fields plaintiff wants. That's the way I read interrogatory number three. These are be these are fields of data that they want. So to your point, give us the list. This seems to be the list.

So if you take that list and go to your client, can you determine whether the database has these fields and, if so, define them for the plaintiffs, and if they don't, that's a separate issue which we'll get to. But in the first instance, it seems like that's something you can do, right?

MR. McLAUGHLIN: Yes, that's something we can do.

THE COURT: Okay. So I think first step may be with interrogatory number three is to take this back, identify which of these categories of information are fields in the database and let plaintiffs know, if that's the case, and to the extent they need a definition of those fields, to provide it to them, although it seems like it would be self-explanatory.

MR. McLAUGHLIN: And I think we have mostly this because we've given them all of the data for the plaintiff, and we've given them all of the fields that we have, and it's populated with all of the data. So I think for most of this they already have it. But I'm happy to, as a separate exercise, go back and answer that question. But I think we have already provided that to them in large part.

THE COURT: All right. It sounds like you probably have, but to try to address or resolve this issue of interrogatory number three and the fields, the fields of the database that the plaintiffs are seeking, it seems like confirming that would be the first step.

Then I take it there will be some subset of what falls out in interrogatory number three that is not identified and doesn't come from a database; is that correct, Mr. McLaughlin?

MR. McLAUGHLIN: Yes.

THE COURT: I'm assuming there's some subset that would not be in the database.

MR. McLAUGHLIN: Yes.

THE COURT: Okay. So to the extent that it's information that plaintiffs are requesting be produced in the case, I guess the first question is, are you -- is it your view that these are responsive, meaning you have documents that would be responsive, you're not objecting on relevance grounds to producing documents in these subparts. What you're objecting to appears to be the exercise of identifying the locations of where these documents are located; is that accurate?

MR. McLAUGHLIN: I think that's accurate. We have not -- we have proposed to plaintiffs with respect to our document search that we -- I mean, a pretty extensive data

source that limits the mailboxes of certain custodians, but otherwise searches, effectively, the company's entire share drive, which houses all of its documents. So I think we would want to put limits on -- that's what we're working through with the ESI protocol -- but, no, we have not said we will not entertain any search terms on any category. We've not made any sort of categorical objection to search terms that would get at many of these categories.

THE COURT: Okay. And in doing that, you already identified or it sounds like you already know what the sources of that information are; these share drives and the custodian files of various people. Those are the categories or the data locations that you're planning to search using these searches. I'm assuming you know what that is. It's not a black box. You know where you'd be searching.

MR. McLAUGHLIN: We know where we'd be searching, yes.

THE COURT: Okay. So I guess why is that hard to provide, either through this interrogatory or informally through emails, explaining to the defendants where you plan to search as part of this ESI protocol? Is that what's in dispute here or am I missing something?

MR. McLAUGHLIN: I mean, we have. We've told them. We haven't heard any response to when we -- other than they've asked us with respect to the various custodians what's the size

of their mailboxes and are you proposing any limitations on running the searches in them? And we've provided that information to them.

What we haven't done, which I don't think is -- we have not, within the share drive, tried to identify among the thousands and thousands and thousands of folders that live within the share drive that may have information sort of try to specify or understand what categories of documents might be in each of those folders. We're going to run searches across the universe.

So, I think, you know, other than saying that the information lives either in the database or in the share drive or in the emails of the custodians, I mean, that is the universe of where our information lives, which we have absolutely conveyed to the plaintiffs.

THE COURT: Okay. So why, Mr. McInturff --

I understand.

So Mr. McInturff, why is that insufficient? I feel like defendants are giving you -- if the goal is to get the underlying information, understand and streamline where you're getting it from, they've provided you that information. I don't understand why it benefits you to have them separately identify which particular custodian or which particular part of the share drive the document is coming from. All of that information would be in the metadata that you would get when it

gets produced.

So why go through this additional exercise when the end of the day you're going to get the underlying documents and you're going to know where it comes from?

MR. McINTURFF: So again, we're talking about the items that are not covered in the database, right?

THE COURT: Yes, that's what we're talking about.

MR. McINTURFF: Yes. So the reason to ask is we're looking for categories of documents that the defendants have that they're using in the course of their business. So the idea that something from a shared drive is going to hit on a search term and then be identified as responsive, is very different than asking them, please identify any categories of documents and data location that contain, for example, data identifying, describing, or analyzing what home -- the retail rates for home heating oil charge by defendant's competitors.

What I've seen in other cases is the defendant will say we've got a workbook where we gather the information and that workbook is updated monthly. And then we know, we know that that is a source.

This is a prior step to -- and if I can just advise the Court where we are in the process. We're in the process of negotiating an ESI protocol. We have other disputes here that we've raised about the defendant's refusal to provide its sources of ESI. We've asked via this interrogatory for them to

identify critical data, data that we believe is going to be -- locations of documents that we believe are going to be critical to the case. We'd expect them to identify it.

Again, we asked a series of questions about database data. We've asked a series of questions about other categories of documents that we think are germane and we shouldn't have to wait for a large scale document production and an ESI search for them to simply identify categories of data that meet this definition. So that's why we asked for it, notwithstanding the fact that we're going to engage in a broader search term search.

THE COURT: Okay. In my view, though, the ultimate goal of interrogatories like this is so that you can target where to search and find and locate the documents that you want, and it appears that you're already doing that through the protocol and through the searching of the documents.

So I think the most efficient way at this stage of the case, given the deadline looming, fact discovery deadline is, one, to have defendants go back, review interrogatory number three and identify with their client which of these items come from the database. Let you know, confirm that with you, and to the extent you need information to define the field of that database, if it's not already self-evident by this subpart that's described in interrogatory number three, that they provide that to you.

For the other information that's not in the database, the parties should proceed with defining a protocol and search terms and searching and producing these documents. And I think it's defendant's obligation to produce responsive documents, to locate where those documents are and to produce them.

If at some point after, you know, you receive documents, you review the documents, you're not getting the information you need, or you think that there's some source of information that's lacking, then come back to the Court and we can address it. But I think at this stage, let's proceed with getting the documents, the underlying documents, produced when it comes to those documents that are outside of the database.

And it sounds like defendants are willing to do that and capable of doing that, and I think that will be the most efficient way to proceed at this stage.

MR. McINTURFF: Okay.

THE COURT: What is the next, if any, issue that needs to be addressed?

MR. McINTURFF: So the next issue is the next paragraph in the same section, too. We've asked for Hop, consistent with your Honor's model ESI order, and I'll give some background.

On July 12 when Hop's prior counsel started making it apparent to us that they couldn't locate the contracts and other sort of preliminary discovery documents, we looked at

your Honor's model ESI order and we asked the defendant to provide disclosure as to the steps Hop has taken to preserve data. Hop's sources of potentially relevant data. The programs and the manner in which the data was maintained. Identification of computer systems used and then identifications of individuals responsible for data preservation.

Those items were taken almost verbatim from the model ESI order and we think that it's more than appropriate for defendant to make these disclosures. Again, we're in the process of negotiating an ESI protocol. The parties have agreed that we're going to agree on the ESI sources that Hop is going to collect and so, you know, many of these items from your Honor's model ESI order relate to, you know, the data that's ultimately going to be collected.

And then there's some sort of preliminary stuff about data preservation that we'd like to know given that, for example, we've had this issue with contracts. I'll say prior counsel also advised us that a litigation hold had been issued but only one hold issued to a nonemployee, and then we ask whether that nonemployee was directed to advise other employees of the litigation hold. We were told that that was privileged.

So we have some concerns about preservation and so we resorted to your Honor's model ESI order and asked these five simple questions, which again are basically verbatim from the

model order. We don't think there's any reason for Hop to withhold this information.

THE COURT: Okay. Mr. McLaughlin.

MR. McLAUGHLIN: Your Honor, I think, again, we weren't involved, obviously, with prior counsel's discussions, but with respect to the Rule 26(f) discovery planning, our view was we took over the case, we understood that we had discovery deadlines. We sort of wanted to kind of leap over and get to the meat of they want documents, tell us what you want.

We told them where the information lives, what I previously outlined for the Court. We said, let's move on to -- I don't know that it's so productive to continue talking about process and procedure when we've told you that we're basically going to run very broad searches across our data and get you documents. Let's focus on negotiating search terms.

So I think we're making progress in that front. I just don't know why it seems like to now turn around and say, well, yeah, but now we want to go back and start talking about where does data live, and all of these things that I think we've already -- aren't really relevant now that we've told them the extent of what we're going to search.

So my view is it's unnecessary at this stage. If they have an issue with our proposed custodians, we can talk about that. If they have an issue -- in terms -- and now with respect to the litigation hold, there's been no suggestion that

that information hasn't been preserved. We have told them -- the contract issue, I think, speaks to that. We preserved every single contract. We have the database that is intact. We've given them the particulars on all the custodians and the fact that emails have all been preserved. This seems like a search for a dispute where none currently exists, and we should be focused on getting discovery done, not the process piece of it.

THE COURT: So I agree with Mr. McLaughlin. I think at this point in the litigation the parties should focus on getting -- moving forward, getting documents produced, taking depositions. To the extent that plaintiffs feel after receiving documents that there are gaps or there are issues or reasons to be concerned about defendant's preservation efforts, then plaintiff can revisit these issues or requests, but at this stage, I agree that I don't see the need to go back in time and to figure out how preservation was done.

I think it sounds like defendants through -- are working through these various interrogatories and issues will be providing information about the source of information, what databases are being searched, all of that is part of the ESI protocol production. To me that, at least in the first instance, should be sufficient.

But again, Mr. McInturff, if after reviewing the documents and getting further into discovery you have reason to

believe that there are data preservation issues that impede your ability to proceed with the case, then raise it with the Court.

MR. McINTURFF: Okay. Thank you, your Honor.

Okay. I'll move on to the next issue.

This is item number three in the letter ECF 77. We've asked for two discrete pieces of information for the custodial email accounts, the date range of available emails is what's still outstanding. Defendants have disclosed the amount of data in the email, but they're not telling us the date range, whether there's been any -- critically whether there's been any restriction on the date range of emails collected.

And, then, second, from the shared drives, we've been asking for Hop to disclose any limitations that it imposed on its collection of data or intends to impose on its collection of data from the share drives, the total volume of data collected, and then the total volume of any data Hop has available but it intends to exclude from its collection.

Again, this is in the context that the parties have agreed to negotiate custodial and noncustodial data sources, and without this information you can't really have a negotiation if you don't understand what your counter-party is doing to limit the available universe of ESI.

And I will also note this has taken almost -- or it queues very closely to item 6(a) in your Honor's model ESI

order, which requires parties to discuss limitations on the fields or file types to be served and specifically date restrictions.

We think that this is information that should have been disclosed long ago, especially since, for several weeks now, both parties have been operating under the understanding that we're going to be negotiating custodial and noncustodial data sources.

THE COURT: Okay. So Mr. McLaughlin, I thought some of this looks like you were providing; what are you not willing to provide?

MR. McLAUGHLIN: Yeah, and I thought we just -- I thought what your Honor just recited addressed the remaining issues that were set forth in the letter motion. But we have not -- I mean, we have provided -- the exhibit that I attached to my response provides the amount of data. We indicate that we had no -- that there were no scope limitations to the ADDs database, the S drive, and what is loaded, what is being loaded in. So I'm not sure what additional information plaintiff thinks we owe them.

What our ESI protocol, which is typical, discusses is once we agree on search terms and run those searches, the volume of the hits is going to dictate how the parties then confer about if there's a need to further narrow or place some limitations. But we are not -- we said we're not going to do

that in the first instance.

Again, this seems like just more work that is not necessary for us to get to the place where we are agreeing on and running search terms. This sort of provides statistics for us. It just seems like it's getting in the way of getting the work done.

MR. McINTURFF: Your Honor, can I respond?

This is absolutely not more work and they absolutely have not responded to these questions. What we're asking is what limitations you're putting on what you've collected. They said -- first of all, they haven't told us the volume of data they have collected from their share drives. They haven't given us any date limitations whatsoever on the availability of that data.

With the email that totals the overall volume, but again, they haven't told us whether there are any date restrictions or what the date range of available email is. Somebody may have a lot of email, but it might be limited to a very limited period of time, and we may need to get additional custodians because of that.

This is -- this is -- defense counsel attached a letter, which is ECF 77.2. The only thing the letter contained is saying where it collected information and how much information is in the email inbox of 13 custodians.

Again, we're asking them to disclose to us what

you're doing to limit the data that you've collected before you collect it. This idea that we're going to run search terms and then they're going to produce documents based on the search terms, before we do that, we need to make sure that what the search terms are being run on is the correct range of data from the custodial and noncustodial data sources.

I mean, this is a very basic question about what is being done to limit the collection of ESI, and there's no reason defendant can't answer this.

THE COURT: So let's take it in pieces. Starting with what plaintiff seeks in point one, in the first point: Custodial email accounts, the name of the accounts, and the date range of available emails.

So Mr. McLaughlin, is that something you believe you've already provided?

MR. McLAUGHLIN: We've given them the name of the custodians, the amount of data in each mailbox.

THE COURT: Okay.

MR. McLAUGHLIN: So by gigabytes and bytes. We've provided that.

THE COURT: And have you imposed any date limitations or date ranges for any of the available emails?

MR. McLAUGHLIN: No. We've collected everything, but we haven't run searches in it. So I have not said, well, this employee has emails going back to 2005, and this employee has

emails going back to -- and we have said we would not impose any date restrictions.

MR. McINTURFF: Yeah, but they're not --

THE COURT: Okay.

MR. McINTURFF: They can tell us when, they can look at the email inbox and tell us the available date of the email that they've collected. That's what we're asking.

Like they've got in their email, they've got this range of data, but they can't tell us, you know, for the first person, their email goes from November 2017 to the present.

That's the issues. We've been asking for the date range repeatedly.

THE COURT: So Mr. McLaughlin, is that something you're able to do within each custodian that you provided assess big picture whether -- what the date range is covered by that custodian is?

MR. McLAUGHLIN: Yes. I imagine our vendor can tell us the earliest email and the latest email for each of these.

THE COURT: So I think that seems to be pretty straightforward and simple, and it seems like something you should be able to provide as part of your negotiations so that you can short circuit any issue of whether defendants believe -- that plaintiffs believe that that will be -- that it's not hitting the date range that they need and, therefore, need to seek other custodian who might.

I think that's the issue, which I understand. It doesn't sound like it's a burden for you to figure out just the earliest date of an email and the last date of an email. So I suggest defendants provide that as part of the other information you have already provided.

In terms of ESI collected from shared drives, so that's the next issue. Plaintiffs want to know if there were any date limitations imposed.

It sounds like the answer is no; is that correct, Mr. McLaughlin?

MR. McLAUGHLIN: Correct.

THE COURT: And in terms of the total volume of data collected, that's something you provided as well? Or not?

MR. McINTURFF: No.

MR. McLAUGHLIN: I thought we had, but I thought it was (indiscernible) I'm not seeing that specific information, but again, it's -- we're not imposing any limitations.

THE COURT: Right.

MR. McLAUGHLIN: So it's whatever we have, we have. I don't know why it matters if it's -- the volume is the volume.

THE COURT: Right. No, I agree that I don't know that it matters, but I guess to the extent plaintiffs want it, I wonder is it burdensome for you to just tell them what that is? It seems you were able to do that for the custodial email

accounts without issue.

MR. McLAUGHLIN: I believe, yes, we can ask the vendor what they've collected, what's the total volume of the share drive.

THE COURT: Okay. Then the next issue that plaintiff is seeking is the total volume of data that Hop intends to exclude.

What do you mean by that, Mr. McInturff? Do you mean whether they intend to exclude anything before applying search terms or after?

MR. McINTURFF: Correct, correct.

THE COURT: Okay. It sounds like the answer is no, right? There are no limitations to that; is that correct Mr. McLaughlin?

MR. McLAUGHLIN: Correct.

THE COURT: Okay. So it seems like this is a non-issue that is easily resolved. Most of the information has already been provided by Mr. McLaughlin except for identifying sort of the date range of available custodial emails, which Mr. McLaughlin has agreed to do.

MR. McINTURFF: Okay.

THE COURT: Okay. Then we move on to the litigation hold question. Is that the next issue?

MR. McINTURFF: Yes, that's the last issue.

All we're asking here is for the identity of the

litigation hold recipients and the dates that the holds were issued. And there's twofold. The reason is twofold for this. And again this -- we started requesting this in July of this year.

The first reason we requested it was because, again, we were told by prior counsel that only one litigation hold was issued, and it was issued to a subcontractor. So we immediately asked that they provide additional information about the litigation hold.

And then the second item is litigation hold information is commonly disclosed in ESI negotiations as reflected in your Honor's model ESI order, because it is something that is commonly used by the receiving party to negotiate custodian. If you look at the defendant's proposal as to which custodian's emails to collect, they have proposed certain custodians, but the information on the litigation hold will allow us to get a sense of other additional custodians to propose, which we haven't yet.

THE COURT: So do you have some reason to believe that you haven't properly identified the correct ESI custodians at this point?

MR. McINTURFF: Oh, well, we haven't identified any. Are you saying do I have reason to believe the defendant --

THE COURT: I get it. Exactly.

So do you have any reason to believe at this stage

that -- they give you a list of ESI custodians, do you have any reason to believe that that custodian list is faulty in some way, that it's not -- that there are other people that are missing that would have gotten a litigation hold and they're not included?

MR. McINTURFF: Well, I mean that's sort of -- that's sort of the unknown unknown. You know, there's two unknowns. There's who got a litigation hold that should have been included, which is why we ask for the litigation hold, but in addition, the parties have agreed in the ESI protocol to negotiate custodians.

You know, we quoted former Magistrate Judge Francis in the Southern District in our letter where he notes that transparency transcends cooperation, because without transparency, we don't know. I can't pick up the phone and call Hop and find out if there's individuals that we believe should have been included in the custodian list. And these types of disclosures behoove all parties so that we can get this done once, and we don't have to then, you know, get an email production, review the email, and start going back multiple times and having fights about, you know, which custodians, adding custodians.

And that's why, you know, traditionally in ESI practice, you front-load disclosures like this. And again, this is -- this is something we've been asking for since July.

THE COURT: Okay. So looking at -- I take your point, Mr. McInturff.

I'm more persuaded by the reasoning of Judge Cott in the *Frank* case that defendant cited, which is particularly on point here, because I think we're not addressing an issue where there is alleged spoliation or at this point inadequacies in production because you haven't received the documents yet. So you don't have the reason to think that the production will be inadequate at that stage.

You have identified through a meet-and-confer process potential custodian, and the defendants seem willing and able to provide you with information about who they are, the volume of data and the like.

To me, having defendants get into litigation holds information with the sole purpose of assisting you to identify whether are there are other ESI custodians, isn't necessary at this stage and it seems that that information can be more easily obtained through the meet-and-confer process and discussions with counsel.

I take Mr. McLaughlin at -- I take it that he takes his obligation seriously to produce responsive documents to identify ESI custodians who have discoverable and responsive information, and it wouldn't serve his purposes either to not include individuals in that search to which a litigation hold would have been provided.

So at this stage, I don't believe that we should get into the weeds of metadata of litigation holds because I don't think the need exists to get you to where you need to be, which is identifying the proper ESI custodians, which you're in the process of doing already.

If at some point, however, you have reason to believe that there are issues, inadequacies in the production, or spoliation issues, or that all of the custodians that you've received are inadequate for some reason, then we can revisit this issue.

MR. McINTURFF: Okay.

THE COURT: Are there any other issues that need to be addressed today?

MR. McINTURFF: No, that's it, your Honor. Thank you very much for your attention to this matter. We appreciate the time you've dedicated.

THE COURT: So as I understand it, by the end -- by Friday, November 10th, the parties will submit a joint letter about the status of your ESI discussion, the sampling that we discussed.

As part of that letter, you should also include the general status update about the outcome of the Court's rulings and how the parties are making their way through negotiating the rest of the ESI protocol.

MR. McLAUGHLIN: Will do, your Honor.

THE COURT: Okay. Great.

And so we will adjourn and, if necessary, I'll set another conference after receiving the parties' submission on November 10th.

MR. McLAUGHLIN: Thank you, your Honor.

MR. McINTURFF: Thank you.

THE COURT: Thank you. Have a good day.

MR. McLAUGHLIN: You too.

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